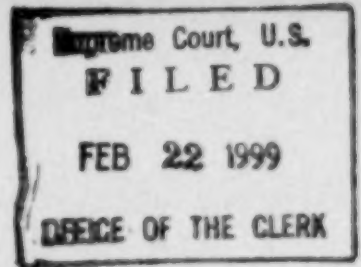


(9)
No. 98-591



IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ALBERTSONS, INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

**BRIEF AMICUS CURIAE OF
UNITED PARCEL SERVICE OF AMERICA, INC.,
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Amicus curiae United Parcel Service of America, Inc., will address the following question:

Whether the court of appeals erred in holding that monocular vision constitutes a "disability" under the Americans with Disabilities Act ("ADA"). Fairly encompassed within that question are two subsidiary issues, namely, (a) whether the court of appeals erred in failing to give proper weight to the ability of an impaired individual to compensate for or mitigate the effects of his or her impairment, and (b) whether the court of appeals erred in holding that respondent was "regarded as" disabled within the meaning of the ADA.

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**BRIEF *AMICUS CURIAE* OF
UNITED PARCEL SERVICE OF AMERICA, INC.,
IN SUPPORT OF PETITIONER**

United Parcel Service of America, Inc. ("UPS") respectfully submits this *amicus curiae* brief in support of petitioner on the question whether monocular vision constitutes a "disability" under the Americans with Disabilities Act ("ADA").¹

INTEREST OF *AMICUS CURIAE*

UPS is one of the largest employers in the United States, with nearly 300,000 employees in all 50 states and every territory. Because of the size and scope of its workforce, UPS has faced the difficult issue of application of the Americans with Disabilities Act in almost every employment context. That difficulty has been compounded by the unduly expansive interpretations of the ADA adopted by some lower courts, which if not corrected will result in extending the coverage of the ADA to far more Americans than can be justified by a common sense reading of the statutory text.

Because it operates in every jurisdiction and venue in this Nation, UPS is vitally concerned with the development of this new federal statute and with the adoption of uniform and statutorily permissible approaches to its application. UPS often speaks out on issues of concern to American employers before Congress, regulatory

¹ Pursuant to this Court's Rule 37.6, UPS states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than UPS or its counsel made a monetary contribution to the preparation or submission of this brief.

agencies, and the federal courts, and is well-situated to present the perspective of large American employers regarding employment law issues.

UPS also has a specific interest in the interpretation of the ADA announced by the Ninth Circuit in this case. UPS is the defendant in a nationwide lawsuit brought by the Equal Employment Opportunity Commission ("EEOC") on the issue of monocular vision under the ADA, *EEOC v. United Parcel Service, Inc.*, No. C 97-961-FMS (N.D. Cal.). In addition, UPS is the respondent in another case currently pending before this Court, *Murphy v. United Parcel Service*, No. 97-1992 (*cert. granted* Jan. 8, 1999), which presents related questions concerning the scope and meaning of the ADA's definition of "disability." The resolution of these questions will have a major impact on the ultimate scope of the obligations and burdens imposed by the ADA on UPS and other American businesses.

For all these reasons, UPS has a substantial interest in the questions presented in this case. Accordingly, UPS respectfully submits this *amicus curiae* brief to demonstrate the erroneous nature of the decision below, and to provide the Court with a more complete understanding of the nature of monocular vision and its minimal impact on the lives of monocular individuals. Both petitioner and respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

I. The court of appeals erroneously adopted a definition of disability under the ADA that sharply conflicts with the plain language of the statute. The court essentially dispensed with the statutory requirement that an impairment must be "substantially limit[ing]" before it will constitute a disability, and instead held that an impairment is disabling whenever it causes the impaired individual to perform a major life activity in a "different manner" than unimpaired individuals. The court's "different manner" test is inconsistent with, and there-

fore precluded by, the statutory text.

The court of appeals also erred in purporting to make a *per se* determination that monocular vision is a disability under the ADA and in failing to require respondent to meet his burden of identifying individualized proof that his monocular vision substantially limits his major life activity of seeing. The court's *per se* approach to this issue is inconsistent with the ADA's definition of disability, which expressly contemplates an individualized determination: "[D]isability" means *with respect to an individual . . . a physical or mental impairment that substantially limits . . . the major life activities of such individual.*" 42 U.S.C. § 12102(2)(A) (emphasis added).

The court of appeals compounded these errors by predicated its finding of disability in part on the fact that respondent has developed the "subconscious" ability to compensate for and mitigate the effects of his impairment. Far from justifying a finding of disability, the ability to minimize the adverse effects of an impairment instead demonstrates that the impairment is *not* disabling, because the disability inquiry requires a real-world examination of the actual present effect of the impairment. Accordingly, the court of appeals' interpretation of the ADA's definition of "disability" is incorrect, and should be rejected.

II. Under a proper understanding of the definition of "disability," it is clear that respondent (like other individuals with monocular vision) is not disabled. The record in this case demonstrates that respondent's monocular vision has not had a substantial impact on his ability to see, and that respondent has developed "subconscious" and permanent internal mechanisms for coping with the effects of his impairment. The scientific and medical literature regarding monocular vision indicates that the remarkable adaptability of the human mind and body enables monocular individuals to conduct their lives in ways that are, for virtually all practical purposes, indistinguishable from those of the average person with bin-

ocular vision. Accordingly, the conclusion is inescapable that respondent is not "substantially limit[ed]" in the major life activity of seeing.

III. The court of appeals also erred in concluding that respondent could be found to be disabled under 42 U.S.C. § 12102(2)(C) on the ground that he was "regarded as" disabled. That holding appears to be predicated on the erroneous assumption that monocular-ity is a disability *per se*, and accordingly cannot withstand scrutiny. In any event, respondent has not met his burden of proving that his monocular vision substantially limits the major life activities of seeing or working, and there is no evidence that Albertsons had a different perception. Albertsons' mere awareness of respondent's impairment is not sufficient to show that Albertsons "regarded" respondent as disabled.

ARGUMENT

I. The Plain Language Of The Act Compels Rejection Of The Reasoning Utilized By The Court Of Appeals In Concluding That Monocular Vision Is A "Disability"

A. The Court Of Appeals Erred In Holding That Individuals Who Perform Activities In A "Different Manner" Are Disabled

Under the ADA, an individual is disabled if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). In keeping with the statutory text, this Court has held that an impaired individual may properly be characterized as disabled if "significant limitations result from the impairment." *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206 (1998) (emphasis added).

Despite the statute's explicit command, the court of appeals essentially dispensed with the requirement that

an impairment must be "substantially limit[ing]" in order to constitute a disability. Instead, the court held, respondent's monocular vision is a disability merely because it causes him to see in a different *manner* than other individuals: "Although [respondent's] brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner* in which he sees differs significantly from the *manner* in which most people see." Pet. App. 14a (emphasis in original); *see also id.* at 14a-15a ("[Respondent] sees using only one eye; most people see using two. *Accordingly*, . . . he is disabled.") (emphasis added); *id.* at 15a n.4 (test "is whether . . . the individual is required to perform a major life activity in a *different manner* from other persons") (emphasis added).

The court of appeals clearly erred in resting its disability holding on the fact that respondent sees in a different *manner* than other individuals. The statutory text expressly limits the category of "disabilities" to those impairments that "substantially limit[]" one or more major life activities of the impaired individual. 42 U.S.C. § 12102(2)(A). Plainly, not every "difference" amounts to a substantial limitation. Indeed, many "differences" in the manner of performing particular activities are not limiting at all, and others are not *substantially* limiting because they do not restrict the affected individual's ability to perform the activity in any essential or important way. An individual who has only one kidney might be required to observe certain dietary restrictions and thus change her manner of "eating," but she would not be substantially limited in any meaningful sense. A person with a mild but permanent leg injury might slightly favor his right foot when he walks, without suffering any meaningful diminution in his ability to walk or perform other activities. These alterations may be imperceptible to others and of little or no consequence to the individuals themselves. Yet under the court of appeals' reasoning, these individuals would be "disabled" because their impairments cause them to per-

form major life activities in a "different manner from other persons." Pet. App. 15a n.4.

The court of appeals suggested that its "different manner" test was compelled by the EEOC's regulations interpreting the ADA, which define "substantially limits" to mean "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to . . . the average person in the general population." 29 C.F.R. § 1630.2(j)(1)(ii). Focusing exclusively on the regulatory reference to the "manner" of performing a major life activity, the court concluded that any variation in the *manner* by which an impaired individual performs a major life activity necessarily satisfies the regulatory definition. Pet. App. 14a-15a.

Contrary to the court of appeals' reasoning, the EEOC regulations do not justify the court's adoption of a "different manner" test. In the first place, the regulations are simply beside the point, because the text of the ADA unambiguously precludes the court's interpretation of the statute. No mere administrative interpretation can override a clear statutory command. *See, e.g., Dole v. United Steelworkers of America*, 494 U.S. 26, 42 (1990) (where "the statute, as a whole, clearly expresses Congress' intention, we decline to defer to [the agency's] interpretation"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

In any event, the EEOC regulations do not justify or compel the court of appeals' "different manner" test. In placing sole emphasis on the word "*manner*" (Pet. App. 14a), the court mistakenly overlooked the regulatory requirement that the individual's manner of performing the relevant activity must be "*significantly restricted*" before a finding of disability can be made. 29 C.F.R. § 1630.2(j)(1)(ii) (emphasis added). As a result, the court of appeals' disability determination draws no sup-

port from, and in fact conflicts with, the regulations on which the court relied.

Not surprisingly, the "different manner" test is inconsistent with the analysis employed by the overwhelming majority of lower courts that have considered the ADA's definition of disability.² This Court should reach the same conclusion, and hold that the ADA precludes the unique "different manner" test adopted by the court of appeals.

² *See, e.g., Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15-16 (1st Cir. 1997); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643-44 (2d Cir. 1998); *Olson v. General Elec. Astro-space*, 101 F.3d 947, 952 (3d Cir. 1996); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997); *Deas v. River West, L.P.*, 152 F.3d 471, 479-80 (5th Cir. 1998), *pet. for cert. filed*, No. 98-916 (U.S. Dec. 2, 1998); *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 371-72 (6th Cir. 1997); *Duncan v. State of Wisconsin Dep't of Health & Family Servs.*, ___ F.3d ___, 1999 WL 44845, at *5 (7th Cir. Feb. 3, 1999); *Perkins v. St. Louis County Water Co.*, 160 F.3d 446, 448 (8th Cir. 1998); *Pack v. Kmart Corp.*, ___ F.3d ___, 1999 WL 51882, at *4 (10th Cir. Feb. 4, 1999); *Standard v. A.B.E.L. Servs., Inc.*, 165 F.3d 1318, 1327 (11th Cir. 1998). *But see Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998). A number of courts have erroneously held that the disability determination is to be made without regard to any compensating or mitigating factors that may minimize the impairment's impact on the affected individual, but even these courts do not follow the Ninth Circuit's "different manner" test. *See Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 865-66 (1st Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629 (7th Cir. 1998); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 521-23 (11th Cir. 1996); *see also infra* Part I.C.

B. The Court Of Appeals Erred In Failing To Require Respondent To Make An Individualized Showing That Monocularity Substantially Limits His Ability To See

Without making any effort to analyze the actual effect of monocular vision on respondent, the court of appeals held that monocularity constitutes a disability *per se*. Pet. App. 13a-15a. According to the court, "it is clear that a person who is blind or practically blind in one eye is disabled within the meaning of the Act" (*id.* at 13a), regardless of that individual's actual ability to perform vision-related activities. The court of appeals erred in addressing the question of monocularity in this *per se* manner, and in failing to require respondent to meet his burden of identifying individualized proof that his monocularity substantially limits his performance of the major life activity of seeing.

Under the ADA, plaintiffs bear the burden of proving that they are disabled.³ In order to meet that burden, respondent was required to make an individualized showing that his impairment rises to the level of a disability: "[D]isability' means, with respect to an individual . . . a physical or mental impairment that substantially limits . . . the major life activities of such individual." 42 U.S.C. § 12102(2)(A) (emphasis added). The statutory text precludes the *per se* approach followed by the court of appeals in deciding this issue, because it requires a

³ See, e.g., *Katz v. City Metal Co.*, 87 F.3d 26, 30 (1st Cir. 1996); *Wernick v. Federal Res. Bank of N.Y.*, 91 F.3d 379, 383 (2d Cir. 1996); *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 763 (5th Cir. 1996); *Ross v. Indiana State Teacher's Ass'n Ins. Trust*, 159 F.3d 1001, 1013 (7th Cir. 1998).

showing that the impairment has a substantial impact on the plaintiff in particular.⁴

Accordingly, instead of holding that monocularity constitutes a disability *per se*, the court of appeals should have affirmed the dismissal of respondent's claims unless respondent could identify sufficient evidence to prove that monocularity substantially limits his major life activities. Other federal courts have followed this course, looking to the plaintiff's performance of daily activities to determine whether he or she is substantially limited in the major life activity of seeing. See, e.g., *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) ("although his peripheral vision is limited by his partial blindness, [plaintiff] is able to perform normal daily activities" requiring visual acuity, including driving cars and motorcycles, and thus he is not "disabled"); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985) (plaintiff's "strabismus" (cross-eyed condition) "had never had any effect whatsoever on any of his activities, including his past work history and ability to carry out" most of his duties at the post office; thus, he was not "handicapped").⁵ The court of appeals erred in failing to follow that same approach here.

⁴ To be sure, some impairments are so severe—or so inconsequential—that this individualized determination can be made in summary fashion. But the court of appeals erred in assuming that monocularity falls into the category of clearly disabling impairments. See *infra* Part II.

⁵ See also, e.g., *Hoppes v. Commonwealth of Pa.*, No. Civ.A. 1:CV-97-1959, 1998 WL 9654107, at *4 (M.D. Pa. Dec. 15, 1998); *Bancalé v. Cox Lumber Co.*, No. 97-113-CIV-FTM-25D, 1998 WL 469863 at *4 (M.D. Fla. May 18, 1998); *Cline v. Fort Howard Corp.*, 963 F. Supp. 1075, 1080-81 (E.D. Okla. 1997); *Overturf v. Penn Ventilator Co.*, 929 F. Supp. 895, 898 (E.D. Pa. 1996); *Sweet v. Electronic Data Sys.*, No. 95 Civ. 3987

C. The Court Of Appeals Failed To Give Proper Weight To Respondent's Ability To Compensate For His Impairment

The court of appeals compounded its errors by failing to give proper weight to respondent's ability to compensate for the effects of his impairment. Indeed, the court appears to have predicated its "different manner" holding at least in part on its determination that respondent's "brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability." Pet. App. 14a. According to the court of appeals, the very existence of these "subconscious mechanisms" supports a finding that he is disabled, because they confirm that "the *manner* in which he sees differs significantly from the *manner* in which most people see." *Id.* (emphasis in original). Under this view, the fact that an impaired individual is able (through use of internal adjustments or other mitigating measures) to perform at essentially the same ability level as unimpaired persons leads to the counterintuitive conclusion that the individual *is* disabled.

The court of appeals' counterintuitive treatment of mitigating factors is inconsistent with the text and structure of the ADA. Far from justifying a finding of disability, an impaired individual's ability to compensate for or mitigate the effects of the impairment is instead an important consideration that weighs heavily against a finding of disability.

The definition of disability is phrased in the present tense—*i.e.*, an "impairment that substantially limits," 42

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(MBM), 1996 WL 204471, at *5 (S.D.N.Y. Apr. 26, 1996); *Walker v. Aberdeen-Monroe County Hosp.*, 838 F. Supp. 285, 288 (N.D. Miss. 1993).

U.S.C. § 12102(2)(A)—thereby demonstrating that the statutorily mandated inquiry is not a hypothetical examination of whether the individual *would* be disabled in the absence of mitigating measures. Instead, the statute expressly looks to the present, and inquires whether the individual is *in fact* "substantially limit[ed]" in performing his or her major life activities. See *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"). The inquiry into the *present* impact of an impairment necessarily requires consideration of present reality, including the real-world impact of any compensating or mitigating measures. For that reason, and for all the reasons set forth in the Brief of *Amici Curiae* American Trucking Associations, Inc., *et al.*, the court of appeals erred in failing to treat respondent's ability to compensate for his impairment as further proof that he is not disabled.

II. Respondent's Monocular Vision Does Not "Substantially Limit" His Major Life Activity Of Seeing

Respondent clearly failed to meet his burden of making an individualized showing that monocular vision "substantially limits" his major life activity of seeing. The record evidence indicates that respondent's monocular vision does not substantially restrict his ability to engage in sight-related activities. That evidence is consistent with the available scientific and medical evidence, and with the fact that most individuals with monocular vision report that they are not substantially limited in their major life activities as a result of their vision impairment. Under a proper understanding of the definition of "disability," therefore, respondent is not disabled.

A. According To His Own Statements And Other Evidence, Respondent Is Not Disabled

Respondent's own statements demonstrate that despite his monocular vision, respondent is not substantially limited in the major life activity of seeing. When asked on his job application whether he had any physical limitations, for example, respondent answered, "None." Ct. App. Supplemental Excerpt of Record at 29. Similarly, respondent testified that his monocular vision has never interfered with his ability to perform any jobs:

Q: Other than your experience at Albertson's, has your eye situation ever interfered with your doing anything else in terms of work that you wanted to do?

A: Not that I recall.

Joint Appendix ("J.A.") 275. Indeed, respondent has held jobs that involved driving, and has performed them without incident. Pet. App. 9a; *see* J.A. 295-96.

Thus, the evidence indicates that respondent has learned to function normally despite having the complete use of only one eye. As the court of appeals observed, "his brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his" condition. Pet. App. 14a. In fact, respondent's adaptation is so complete that "it was hard for [him] to believe what they were talking about" when his physician explained that there was "[s]omething[] wrong with [his] vision." J.A. 285. Thus, it is not surprising that respondent's monocular vision has not interfered with his ability to complete a college degree and work in a wide range of jobs, including serving as a county power equipment supervisor, building and operating a laundromat, driving trucks, operating a service station, running a garbage hauling business, and repairing jet aircraft, trucks, and automobiles. *See* J.A. 137-38, 272-73, 282, 286-88; *see also* Ct. App. Excerpt of

Record 59, 63-67.

To classify as "disabled" someone as able as respondent merely because he makes do with one eye is to ignore the plain language of the ADA, which requires that an individual must be *substantially* limited in a major life activity before being classified as disabled. It is also to adopt one of the very "stereotypic[al] assumptions not truly indicative of the individual ability of such individuals" that the ADA was designed to stamp out (42 U.S.C. § 12101(a)(7)), and to convert the ADA into one of the very "overprotective rules and policies" that the statute forbids. 42 U.S.C. §§ 12101(a)(5), 12112(a), (b)(1). The court of appeals erred in employing a generalized and stereotypical view of the impact of monocular vision rather than engaging in an individualized assessment of the sufficiency of respondent's evidence to prove that he is disabled—an assessment that would inevitably have led to a determination that he did not meet that burden.

B. Monocular Vision Is Not A Disabling Condition

The medical and scientific literature regarding monocular vision confirms that, contrary to the court of appeals' stereotypical assumption, monocular vision is not a disabling impairment. Individuals with monocular vision "lead quite normal, healthy and productive lives." Cecilia Y. Perez, *The Visual Ramifications Of Losing An Eye (Part II)*, 9 J. VISION REHAB. 12, 17 (1995). In fact, the vast majority of individuals with sight in one eye neither perceive themselves as disabled nor are disabled, and, although "the ophthalmic literature rarely addresses the impact of monocular vision on individuals' life activities" (John V. Linberg *et al.*, *Recovery After Loss of an Eye*, 4 OPTHALMIC PLASTIC & RECONSTRUCTIVE SURGERY 135, 136 (1998)), the available reports—both scientific and anecdotal—consistently indicate that monocular individuals can engage freely and without significant limitation in all of the major life activities that

binocular individuals enjoy, including activities involving eyesight.

In a recent survey conducted under the auspices of the West Virginia University Department of Ophthalmology, for example, "the great majority of monocular adults had no subjective perception of disability in everyday tasks, and reported that the time required for adjustment [to monocular vision] was short." Linberg *et al.*, *supra*, at 137. After one month, half of the individuals participating in the study had adjusted to their impairment and returned to their normal activities, including "driving," "work," "recreation," "home activities," and "walking." *Id.* at 135-37. After one year, 93 percent "had adjusted to the loss of their eye . . . with respect to" those activities. *Id.* For 80 percent of the monocular individuals studied, their loss of an eye had "no effect" on their normal activities after the adjustment period had ended, and for approximately two-thirds of those studied their impairment had not "changed [their] life in any permanent way." *Id.* at 136, 137. The study concluded by rejecting the suggestion that "loss of an eye creates a significant handicap." *Id.* at 137.⁶

⁶ The deposition testimony of plaintiffs with monocular vision in *EEOC v. United Parcel Service, Inc.*, No. C 97-961-FMS (N.D. Cal.), consistently supports these findings. For example, when asked whether there is "any activity that you feel you won't do or can't do because of your impaired vision," plaintiff James Akins answered, "No." Akins Depo. at 11. When asked, "How, if at all, your vision impairment affect[s] your day-to-day life," plaintiff Shawn Hogya replied, "Day to day it doesn't affect me I have learned to adapt to it over the years." Hogya Depo. at 9. When asked whether "your vision impairment substantially limits your ability to see," plaintiff Stephen Ligas answered, "No," and when asked whether "there [is] any activity that you don't do or won't do because of your vision,"

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In the world of sports, in all age groups and even at the highest levels of competition, monocular vision is not rare. In the National Football League, for example, recent top draft picks such as Cedric Jones from the University of Oklahoma and Jermaine Mayberry of Texas A&M were top college performers despite their monocular vision, and retired monocular players include Kansas City Chiefs tight end Fred Arbanas and Pro Bowl receiver Wesley Walker of the New York Jets. See Jerry Wizig, *Day Turns Out As Well As Jones Could Envision*, HOUSTON CHRON., Apr. 21, 1996, at 14; see also Dick Weiss, *Gator More Than Meets The Eye*, N.Y. DAILY NEWS, Dec. 24, 1998, at 74 (Univ. of Florida basketball star Eddie Shannon); Jerry Sullivan, *Lady Bengal's Vision To Excel, Help Others Puts Her Life In Focus*, BUFFALO NEWS, Dec. 10, 1998, at E1 (high school basketball star Renee Witt). The experiences of these individuals are supported by scientific study of the visual coordination required for athletics. A 1993 study at York University in Ontario, Canada, demonstrated that individuals with monocular vision "are able . . . to discriminate differences in the direction of motion in depth," and that as a result, monocular individuals, like other "sports players of even moderate accomplishment[,] can judge precisely the direction of motion in depth . . . when catching or hitting a ball." D. Regan and Suneeti Kaushal, *Monocular Discrimination in the Direction of Motion in Depth*, 34 VISION RES. 163, 173, 175-76 (1994).

In some contexts, in fact, individuals "are more accurate with monocular than with binocular vision." Wil-

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he again answered, "No," and finally, when asked whether "you feel you can do everything as well as people with two unimpaired eyes," he replied, "Yes." Ligas Depo. at 8.

liam Prinzmetal and Laurie Gettleman, *Vertical-horizontal illusion: One eye is better than two*, 53 PERCEPTION & PSYCHOPHYSICS 81, 81 (1993). For example, individuals with binocular vision often mistakenly judge a vertical line to be longer than a horizontal line of the same length. In a study sponsored by the National Institute of Mental Health, researchers determined that individuals with one eye tend to make more accurate visual judgments on such tests. *Id.* at 87. Scientific consensus holds that this is at least in part a product of the differences between the elliptical field of view created by the overlapping fields of view in binocular vision and the more nearly circular field of view in monocular vision. *Id.*

In short, monocular vision does not result in a substantial limitation on the major life activity of seeing. Contrary to the reasoning of the court of appeals, therefore, monocular vision does not rise to the level of a disability.

C. Scientific Studies Show That Monocular Vision Raises Serious Safety Concerns In The Context Of Commercial Driving

The fact that monocular individuals are not substantially limited in the major life activity of seeing does not mean, however, that such individuals are fully qualified to perform all sight-related tasks at the same level as binocular individuals. While monocular individuals are fully capable of leading normal lives and may be able to perform the full range of passenger-car driving-related tasks, the consensus in the scientific and professional community—a consensus accepted and implemented by the U.S. Department of Transportation ("DOT") (see 49 C.F.R. § 391.41)—is that serious safety concerns are

presented by the prospect of monocular individuals serving as drivers of commercial vehicles.⁷

For example, the leading study prepared for the DOT on this subject concludes that "the wording of a standard that *de facto* excludes monocular drivers . . . is supported by the ratings." Lawrence E. Decina *et al.*, *Visual Disorders and Commercial Drivers* 1, 30 (National Tech. Info. Serv. ("NTIS") Nov. 1991). The same report recommends that the DOT retain its ban on monocular drivers in buses and in large trucks traveling in interstate commerce (*id.* at 37), a recommendation that the DOT has followed. See 49 C.F.R. § 391.41.

Similarly, the largest regional study of truck driver safety concludes that truck drivers with visual impairments, including monocular vision, are substantially more likely to be involved in accidents and be convicted of traffic violations than unimpaired drivers. See Patrice N. Rogers *et al.*, *supra* note 7, at iii (visually impaired drivers in state-licensed commercial vehicles had a 65 percent higher accident rate than non-impaired drivers, and a 58 percent higher rate of convictions for traffic violations). Numerous other studies are to the same effect. See, e.g., Patrice N. Rogers and Mary K. Janke, *Performance Of Visually Impaired Heavy Vehicle Op-*

⁷ Of course, the safety concerns raised by monocular vision in commercial drivers varies depending on the extent of the impairment. See, e.g., Patrice N. Rogers *et al.*, ACCIDENT AND CONVICTION RATES OF VISUALLY-IMPAIRED HEAVY-VEHICLE OPERATORS ii-iv (Cal. DMV, Rept. No. RSS-87-111, Jan. 1987). There is no scientific agreement on the extent of vision impairment in the worse eye that is required to render an individual "monocular." Thus, depending on the definition employed, there may be some "monocular" individuals who can drive commercial vehicles within acceptable safety limits.

erators, 23 J. SAFETY RESEARCH 159, 159-70 (1992); Robert L. Henderson and Albert Burg, *Vision And Audition In Driving* (NTIS Nov. 1974); Robert L. Henderson and Albert Burg, *The Role Of Vision And Audition In Truck And Bus Driving* (NTIS Dec. 1973).

A number of factors combine to create these serious safety concerns regarding monocular individuals of commercial vehicles. First, most commercial vehicles are configured differently than passenger cars. They typically are larger and heavier, making them more difficult to control and stop and reducing the time available to react to perceived dangers. Commercial vehicles also typically have restricted lines of sight and generally have no rear-view mirrors, instead relying on side mirrors which require the driver to turn his or her head to obtain complete driving information. The combination of these factors can render the monocular commercial driver "essentially without forward visual acuity because there is no nasal retina of the [other] eye to register images which are forward while the head and [other] eye are turned." Arthur H. Keeney, *The Monocular Quandary* 1, 7 (1994), cited at 59 Fed. Reg. 59,386, 59,388 (1994).

In addition, commercial drivers (unlike passenger car drivers), often have no discretion regarding whether they must drive in darkness or bad weather conditions—and those conditions pose particular problems for monocular drivers. John R. Griffin *et al.*, BINOCULAR ANOMALIES: DIAGNOSIS AND VISION THERAPY 4 (3d ed. 1995). Furthermore, depth perception—and its essential correlate, the ability to estimate when a vehicle will collide with an approaching object—are less accurate among monocular drivers, especially at close range. R. Gray and D. Regan, *Accuracy of Estimating Time to Collision using Binocular and Monocular Information*, 38 VISION RES. 499, 507-09 (1998); accord Viola Cavallo and Michel Laurent, *Visual information and skill level in time-to-collision estimation*, 17 PERCEPTION 623, 629 (1988).

While these differences between monocular and binocular drivers may be insignificant in the context of private passenger vehicles, for the monocular commercial driver they "are compounded by heavy truck weights, less maneuverability, prolonged stopping distance and the need to monitor road conditions and other vehicles more minutely." Keeney, *supra* at 5-6. Moreover, the stakes are higher with larger vehicles. "Though crashes are statistically *rare* events in the multi-million population of commercial drivers, these rare events are often tragedies—and even more unfortunately—result in death or injury to one or more occupants in a passenger vehicles involved in such a crash." *Id.* at 19; Decina, *supra* at 1. As a result, while for most purposes "[t]he monocular driver may be licensed with only small additional risk for driving," as a general rule such drivers "should not be licensed for commercial vehicle operation." Keeney, *supra* at 20.

The DOT has been authorized by Congress to study the question whether to retain or modify the regulatory ban on monocular drivers of commercial motor vehicles moving in interstate commerce (*see* 49 U.S.C. § 31136), but it has declined to eliminate its general prohibition against monocular drivers of commercial vehicles requiring DOT certification.⁸ On one occasion, the agency has

⁸ Recognizing the capabilities of monocular individuals in general, the DOT conducted an experimental waiver program in an effort to determine whether the agency should modify or abandon its ban on monocular drivers. *See* 61 Fed. Reg. 13,338 (1996); *Advocates for Highway & Auto Safety v. FHWA*, 28 F.3d 1288 (D.C. Cir. 1994). Ultimately, however, the DOT decided to retain its general ban on monocular drivers, concluding that "there were weaknesses in the waiver study design" and that the waiver program "has not produced . . . sufficient evi-

exercised its authority under 49 C.F.R. § 391.41 to make an individualized determination that a monocular driver was qualified to drive commercial vehicles despite his impairment. *Rauenhorst v. United States Dep't of Transp.*, 95 F.3d 715 (8th Cir. 1996). But for the reasons set forth above, the available scientific evidence does not justify treating all monocular individuals as qualified to drive commercial vehicles, even though such individuals are able to drive private passenger vehicles and perform virtually all other significant sight-related tasks without substantial limitation.

III. The Court Of Appeals Erred In Holding That A Genuine Issue Of Material Fact Exists As To Whether Respondent Was "Regarded As" Disabled

As an "alternative" ground for its determination that respondent is disabled under the ADA, the court of appeals held that respondent could be found to be disabled under the "regarded as" prong of the ADA's disability definition. Pet. App. 16a-17a. This "alternative" ground, however, provides no support for the judgment below. In the first place, for the reasons set forth in Part III.A. below, the court of appeals' holding in this regard is dependent on the court's initial conclusion that monocular vision constitutes a disability *per se*. Since the latter determination is erroneous, the former cannot survive either.

Second, even if the "regarded as" holding could properly be viewed as an independent ground for the judgment below, the court's analysis could not withstand

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dence upon which to develop new vision ... standards." 61 Fed. Reg. at 13,340.

scrutiny. The evidence indicates only that Albertsons correctly viewed respondent as a monocular individual whose impairment rendered him unable to satisfy the job-related prerequisites for employment as a commercial truck driver—not that Albertsons regarded him as substantially limited in the major life activities of seeing or working. Thus, there is no basis for a finding of disability under the "regarded as" prong of the statutory definition of disability.

A. The Court Of Appeals' Analysis Of The "Regarded As" Issue Is Fatally Dependent On The Incorrect Premise That Monocular-ity Is A Disability *Per Se*

The "regarded as" prong of the definition of disability provides that an individual is disabled if he or she is "regarded as" having an impairment that substantially limits one or more major life activities, even though the individual does not in fact suffer from such an impairment. 42 U.S.C. § 12102(2)(C). In this case, respondent claims that one of Albertsons' managers described him as "blind in one eye or legally blind." Pet. App. 17a. The court of appeals held that this statement, standing alone, was sufficient to create a "genuine issue of fact regarding whether Albertson's perceived [respondent] as disabled" within the meaning of the ADA. *Id.* at 16a.

The court of appeals' conclusion in that regard was erroneous. Under the statutory definition, an employer's mere recognition that an employee is *impaired*—such as by being "blind in one eye or legally blind"—is insufficient in itself to support a finding that the employee is regarded as *disabled*, unless the perceived impairment (if actually present) would *itself* constitute a disability. This conclusion follows directly from the plain language of the statute: Under prong one of the definition, an individual who actually has an impairment that "substantially limits" a major life activity is disabled in fact. 42 U.S.C. § 12102(2)(A). Under prong three of the

definition (the "regarded as" prong), an individual who is "regarded as having *such an impairment*" is disabled. 42 U.S.C. § 12102(2)(C). The reference to "such an impairment" in prong three is, of course, a reference to the type of impairment previously described in prong one, *i.e.*, an impairment that would, if actually present, render the individual disabled in fact. Accordingly, an employee is not "regarded as" disabled within the meaning of the ADA unless the individual is perceived as having an impairment that "substantially limits" a "major life activity."⁹

As explained in Parts I and II above, the court of appeals erred in concluding that respondent's monocular vision "substantially limits" respondent's "major life activity" of seeing. As a result, the court's "regarded as" analysis cannot withstand scrutiny, because it necessarily proceeds from the incorrect premise that monocular vision is a

⁹ In keeping with the statutory text, every court of appeals to consider this issue has held that a perceived impairment must be substantially limiting, or perceived as substantially limiting, in order for the plaintiff to be "regarded as" disabled. *See Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 153 (2d Cir. 1998); *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 904-03 (10th Cir. 1997), *cert. granted*, No. 97-1943 (U.S. Jan. 8, 1999); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806-07 & n.10 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998); *Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 912 (11th Cir. 1996), *cert. denied*, 118 S. Ct. 630 (1997); *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996); *Cook v. State of Rhode Island*, 10 F.3d 17, 25 (1st Cir. 1993) (Rehabilitation Act case); *Forrisi v. Bowen*, 794 F.2d 931, 934-35 (4th Cir. 1986) (same).

disability *per se*, and hence that an employer's perception that an employee has monocular vision amounts to a perception that the employee is disabled. Since monocular vision is not actually disabling for respondent (or as a general matter), the court of appeals' "regarded as" holding must be reversed.

B. Respondent Was Not "Regarded As" Substantially Limited In A Major Life Activity

Even if the court of appeals' "regarded as" holding were not entirely dependent on its erroneous conclusion that monocular vision is *per se* disabling, reversal would still be required. On this record, there is no basis for a finding that respondent was "regarded as" disabled, because there is nothing to suggest that Albertsons perceived him as substantially limited in the major life activities of seeing or working.¹⁰

1. Respondent Was Not Regarded As Substantially Limited In The Major Life Activity Of Seeing

The record in this case fails to demonstrate that Albertsons perceived respondent's impairment as "substantially limit[ing]" his major life activity of seeing. To the contrary, as explained in Part II above, respondent's monocular vision is in fact *not* disabling, and there is nothing to suggest that Albertsons mistakenly viewed it as more severe an impairment than it actually is. Instead, the record reveals that Albertsons perceived respondent merely as someone who, by virtue of his monocular vision, did not satisfy the job-related qualification standards re-

¹⁰ Respondent claims to be "regarded as" substantially limited in the major life activities of seeing and working. Pet. C.A. Br. 11-13; Resp. C.A. Reply Br. 7-9.

quired to be a truck driver for Albertsons. Albertsons has a consistent policy of employing only truck drivers who meet or exceed minimum DOT standards (J.A. 53), and terminated respondent because "he was not qualified under the DOT minimum requirements." *Id.* at 314, 339. Albertsons' accurate belief that respondent did not meet those standards because of his impairment cannot be bootstrapped into a finding that Albertsons regarded respondent as substantially limited in his ability to see.

That conclusion is bolstered by Congress's understanding of the function served by the "regarded as" provision, which was drawn directly from the Rehabilitation Act. As this Court recognized in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), Congress extended protection to persons who are merely "regarded as" disabled because it was concerned that "society's accumulated myths and fears about disability" are as handicapping as the physical limitations themselves. *Id.* at 284 (discussing the Rehabilitation Act's precursor to the ADA's "regarded as" prong). Plainly, Albertsons' rationale for discharging respondent cannot be equated with the societal "myths and fears" that are the target of this prong of the disability definition. Albertsons did not terminate respondent's employment based on any myths or fears about disability, but instead because he failed to meet a specific job qualification—a qualification based on regulations promulgated by the DOT. Accordingly, there is no basis for a finding that Albertsons "regarded" respondent as substantially limited in the major life activity of seeing.

2. Respondent Was Not Regarded As Substantially Limited In The Major Life Activity Of Working

The fact that respondent was terminated because of his inability to satisfy a prerequisite for a particular job also precludes a finding that Albertsons regarded him as "substantially limited" in the major life activity of

working. Because of his impairment, respondent was foreclosed from driving a truck for Albertsons. That "limitation" on his ability to work is insignificant, not "substantial."

As this Court held in *Bragdon*, administrative and judicial interpretations of the Rehabilitation Act provide persuasive guidance in interpreting analogous provisions of the ADA, including the definition of disability. See *Bragdon*, 118 S. Ct. at 2208 ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates . . . the intent to incorporate [those] interpretations as well."). Thus, Rehabilitation Act cases discussing whether an impairment substantially limits the major life activity of working are highly relevant here, and confirm that respondent was not, and was not "regarded as," disabled in this regard.

For example, in *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986), a utility systems repairer suffered from acrophobia and was terminated because he could not climb stairways and ladders. *Id.* at 933. The Fourth Circuit rejected his claim that he was "regarded as" handicapped under the Rehabilitation Act, explaining that an employer does not "regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job." *Id.* at 934. Instead, the test is whether the employer finds "the employee's impairment to foreclose generally the type of employment involved." *Id.* at 935. Since the plaintiff had no trouble obtaining jobs in his field, the court held that, "[f]ar from being regarded as having a 'substantial limitation' in employability, Forrisi was seen as unsuited for one position in one plant—and nothing more." *Id.*

Similarly, in *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984), United terminated a flight attendant because his weight exceeded the amount that United had established as the maximum for male flight attendants of his height. *Id.* at 740. The flight attendant

sued United and argued that he was, or was regarded as, substantially limited in the major life activity of working. The court rejected the plaintiff's argument, reasoning that the inability to perform a single job is not a "substantial limit[ation]" of the ability to work. *Id.* at 745. Further, the court concluded, United did not perceive the plaintiff as limited in his activities; "[d]efendant merely regards plaintiff as not being under a certain weight." *Id.* at 746. The court "refuse[d] to make the term handicapped a meaningless phrase." *Id.*¹¹

The common thread running through these cases is that an employee is not "substantially limited" in the major life activity of working if he or she is disqualified from a specific job because of a particular job requirement, even if other employers might impose the same requirement for the same or similar job. It was open to Congress in enacting the ADA to repudiate these courts' interpretations of the Rehabilitation Act, but it did not. Accordingly, this Court should presume that Congress ratified these courts' interpretation when it reenacted the

¹¹ Other Rehabilitation Act cases are to the same effect. See, e.g., *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985) (mail clerk who suffered from "strabismus" (a cross-eyed condition) was not substantially limited in the major life activity of working even though his impairment rendered him unable to operate a mail-sorting machine and thus led to his termination, because his impairment did not affect "his past work history and ability to carry out other duties at the post office"); *Torres v. United States Postal Serv.*, 610 F. Supp. 593, 594-97 (N.D. Tex. 1985) (mail carrier who was terminated in part because his left-handedness hampered his ability to perform mail "casing" was not handicapped because an impairment which interferes with an individual's ability to do a particular job, but does not significantly decrease his ability to obtain other satisfactory employment, is not substantially limiting).

same statutory language in the ADA. See *Bragdon*, 118 S. Ct. at 2208.

Indeed, even the EEOC's interpretive guidance cites *Forrisi* and *Jasany* with approval in discussing the meaning of "substantial" limitations on the major life activity of working. 29 C.F.R. Pt. 1630, App., Section 1630.2(j).¹² Thus, it is indisputable that an individual who is, or is perceived as being, precluded from performing a particular job is not "disabled." Rather, as the *Forrisi* court explained, the employee's impairment must "foreclose generally the type of employment involved" before it can be found to impose a "substantial limit[ation]" on the major life activity of working.

The EEOC's regulations are consistent with this understanding of the statute. They provide:

The term *substantially limits* means significantly restricted in the ability to perform either a *class of jobs* or a *broad range of jobs in various classes* as

¹² We note that petitioner errs in suggesting that the EEOC's interpretive guidance is entitled to "great deference." Pet. Br. 18 n.6. The EEOC's guidance is merely an interpretive rule issued without notice and comment; as such, it "do[es] not have the force and effect of law and [is] not accorded that weight in the adjudicatory process." *Shalala v. Guernsey Mem. Hosp.*, 115 S. Ct. 1232, 1239 (1995). Since its decision in *General Electric Co. v. Gilbert*, 429 U.S. 124, 140-46 (1976), this Court has consistently held that "the level of deference afforded [to the EEOC's guidance] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991). And this Court has never deferred to EEOC guidance that "lacks support in the plain language of [a] statute." *Id.* at 257-58.

compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i) (emphasis added). A "class of jobs" includes "jobs utilizing similar training, knowledge, skills or abilities" within the geographical area to which the individual has reasonable access. A "broad range of jobs in various classes" encompasses "other jobs not utilizing similar training, knowledge, skills or abilities" as the job from which the individual has been disqualified. *Id.* § 1630.2(j)(3)(ii)(B) and (C).

Under these regulations, and in keeping with *Forrisi* and the other pre-ADA cases discussed above, an impairment is not substantially limiting if the jobs from which it disqualifies the individual amount to something less than an entire "class of jobs" or "broad range of jobs in various classes." Federal courts considering whether an individual is substantially limited in the major life activity of working have consistently adhered to this understanding of the ADA. For instance, in *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366 (11th Cir. 1998), a pilot whose impairment resulted in his termination brought a claim under the ADA, arguing that his employer (Delta) regarded him as significantly restricted in the ability to perform a class of jobs. *Id.* at 1370. The Eleventh Circuit disagreed, holding that "piloting airplanes is too narrow a range of jobs to constitute a 'class of jobs.'" *Id.* "There are non-piloting jobs in the Atlanta area which utilize 'similar training, knowledge, skills or abilities' as piloting jobs," including "pilot ground trainer, flight simulator trainer, flight instructor," and many others. *Id.* Thus, "to establish that Delta perceived him as unable to perform the relevant 'class of jobs,' Witter would have to prove Delta regarded him as unable to perform not just the job of being a pilot, but also the non-piloting jobs we have discussed." *Id.* Because he failed to do so,

he could not show that he was "regarded as" disabled. *Id.*¹³

Like Witter, respondent cannot show that he was regarded as unable to perform any other jobs in his geographic area that utilize "similar training, knowledge, skills or abilities." Respondent could no doubt have obtained any number of transportation-related jobs in his region, and there is no indication that Albertsons perceived him as unable to do so. Nor is there any evidence that respondent was "regarded as" unable to perform other driving-related jobs not requiring compliance with DOT standards.

Accordingly, this case is just like the Rehabilitation Act cases that Congress implicitly approved when it en-

¹³ *Accord, e.g., Patterson v. Chicago Ass'n for Retarded Citizens*, 150 F.3d 719, 725 (7th Cir. 1998) ("Patterson's impairment must render her incapable of performing any teaching job, not just a specific sort of teaching job. Her impairment 'must substantially limit employment generally.'"); *Thompson*, 121 F.3d at 540 (nurse with lifting restriction who, as a result, could not perform "total patient care" was capable of performing other types of jobs within the health care industry and, thus, was not substantially limited in the activity of working); *McKay*, 110 F.3d at 373 (plaintiff's impairment, which prevented her from performing "repetitive-motion factory work," did not "significantly restrict her ability to perform either a class of jobs or a broad range of jobs in various classes"); *Bridges v. City of Bossier*, 92 F.3d 329, 334 (5th Cir. 1996) ("[A] limitation that prevents one from becoming a firefighter—or even a firefighter and associated municipal paramedic or EMT backup firefighter—... only affects a 'narrow range of jobs.'"), *cert. denied*, 519 U.S. 1093 (1997); *Daley v. Koch*, 892 F.2d 212, 215-16 (2d Cir. 1989) (individual with an impairment that rendered him unsuitable for police work was not substantially limited from working under the Rehabilitation Act).

acted the ADA. As in *Forrisi*, respondent was disqualified from performing a particular job based on a specific job requirement—nothing more. To conclude that respondent, who has held numerous jobs in the transportation industry and elsewhere, was regarded as substantially limited in the major life activity of working would drastically and unjustifiably expand the class of persons protected by the ADA. *Anyone* who is rejected for or terminated from a job based on an impairment—even one that does not interfere with any other major life activity—would be able to claim that they were “regarded as” substantially limited in the major life activity of working. To effectuate the ADA’s “substantially limits” requirement, individuals who claim to have been “regarded as” disabled based on the major life activity of working must show they were perceived as restricted from all other positions in their geographic area that involve “similar training, knowledge, skills or abilities.” This Court should not “construe the Act . . . as a handout to those who” are not substantially limited in any major life activity and who “are in fact capable of working in substantially similar jobs.” *Sutton*, 130 F.3d at 906.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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